No. 96-653

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

KENNETH LEE BAKER and STEVEN ROBERT BAKER, by his next friend, MELISSA THOMAS,
Petitioners,
v.
GENERAL MOTORS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT

THOMAS A. GOTTSCHALK
JAMES A. DURKIN
GENERAL MOTORS CORPORATION
3031 West Grand Boulevard
Detroit, Michigan 48232
(313) 556-5000

KENNETH W. STARR
Counsel of Record
PAUL T. CAPPUCCIO
RICHARD A. CORDRAY
JAY P. LEFKOWITZ
PATRICK F. PHILBIN
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Attorneys for Respondent.

July 21, 1997

QUESTION PRESENTED

Whether the Full Faith and Credit Clause and the Full Faith and Credit Statute require courts to respect an injunction issued by a state trial court in a judicial proceeding by giving it the same faith and credit that it receives in courts of the State of issuance.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, General Motors Corporation advises the Court that the following is a list of General Motors' non-wholly-owned subsidiaries as reported to the Securities and Exchange Commission in Exhibit 21 to General Motors' Form 10-K Annual Report for the year ended December 31, 1996.

Asset Leasing GMbH
Carus Grundstucks-Vermietungsgesellschaft mbH & Co.
General Motors GmbH & Co. OHG
Opel-Automobilwerk Eisenach-PKW GmbH
Auto Cable Industries (Pty) Limited
Convesco Vehicle Sales GmbH
Contro Toonico Herramental, S.A. de C.V.
Packard Electric Hebi Co., Limited
Packard Electric Bai Cheng Co., Limited
Delphi Italia Automotive Systems S.r.1.
Delphi Italia Service Center S.r.1.
DRB s.a./n.v.
Opel France S.A.
ENCI S.A.R.L.
Texton P.L.C.
Delphi Harrison
Delphi L'EM Argentina S.A.
Reinshagen Tournai S.A.
GM Ovonic L.L.C.
Banque Opel
General Acceptance (Thailand) Ltd.
Holden National Leasing Limited
GM Finance HB
OPEL Leasinggesellschaft mbH
Polbank, S.A.
P.T. GMAC Lippo Finance

RULE 29.6 STATEMENT
(continued)

General Motors de Argentina S.A.
Beijing Wanyuan GM Automotive Electronic Control Co., Ltd.
Hubei Delphi Automotive Generator Co., Ltd.
Saginaw Norinco Lingyun Drive Shaft Co., Ltd.
Zhejiang Delphi Asia-Pacific Brake Co. Ltd.
General Motors Colmotores, S.A.
IBC Vehicles Limited
Millbrook Pension Management Ltd.
DIRECTTV Enterprises, Inc.
IBC Vehicles (Distribution) Limited
GM-Saab Communication GmbH
Packard CTA Pty. Ltd.
Packard Electric Systems Samara Cable Company
PT General Motors Buana Indonesia
P.T. Packard Kabelindo Murni Indonesia
Radiodores Richard, S.A.

In addition, General Motors has recently acquired an interest in PanAmSat Corporation.

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INTRODUCTION

Contrary to petitioners' contentions, this is *not* a case about a purported right to secure every man's evidence or the silencing of whistleblowers. Rather, this case is about respecting the orderly principles of full faith and credit that are "the foundation of any hope we may have for a truly national system of justice, based on the preservation but better integration of the local jurisdictions we have." Hon. Robert H. Jackson, *Full Faith and Credit -- The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 34 (1945).

In this case, a Michigan court issued an injunction prohibiting a disgruntled former employee, Ronald Elwell, from testifying against General Motors Corporation ("General Motors") in products liability suits. The injunction was necessary because Elwell had already wrongfully disclosed privileged information and because he specifically admitted to the Michigan court that it was virtually impossible for him to distinguish between what he had learned while at General Motors from privileged sources and what he had learned from non-privileged sources.

Petitioners believe the Michigan injunction is too broad and that it violates public policy. But they steadfastly refuse to bring their objections to the Michigan court that issued the injunction -- most likely because they realize that the Michigan court is too familiar with the *facts* of this case to accept blindly petitioners' unsubstantiated *allegations* that General Motors is trying to purchase the silence of a whistleblower. Instead, petitioners claim nothing short of a hitherto unknown *constitutional right* to avoid the Michigan court and to attack its judgment collaterally in the forum of their choice -- here a United States District Court in Missouri. The Constitution does not grant petitioners the right to such an end-run around the judgment of another State. To the contrary, petitioners' claims are fundamentally at odds with the text and purpose of the Full Faith and Credit Clause and its implementing statute.

STATEMENT OF THE CASE

Petitioners ominously suggest that this case is about purchasing the silence of potential witnesses, suppressing whistleblowers, and manipulating individual state courts to subvert the civil justice system nationwide. In reality, this case is about Ronald Elwell's efforts, acting in concert with attorneys for various plaintiffs across the country, to sell privileged information and to manipulate different court systems to evade the terms of an injunction lawfully entered by a Michigan court.

In what is now a well-rehearsed script, Elwell voluntarily appears in a jurisdiction far from his home where a case against General Motors is pending, the plaintiff's attorney argues that the court need not give full faith and credit to the Michigan injunction, and, where the plaintiff is successful, the court "orders" Elwell to testify. By repeating this maneuver in jurisdictions from coast to coast, Elwell has enabled plaintiffs in products liability actions to purchase his testimony -- at a rate up to $300 per hour, *see infra* page 8 -- in flat defiance of the Michigan judgment.

A. Background to the Underlying Civil Action.

This case involves tort claims arising from an automobile accident that occurred when Doris McElwain tried to pass a truck on Highway 63 in Missouri, and her car slammed head on into a Chevy S-10 Blazer. After the collision, a fire started in the engine compartment of the Blazer. Beverly Garner, a front-seat passenger, was killed in the accident. Pet. App. 3a.

Ms. Garner's children -- Kenneth and Steven Baker -- brought this strict products liability action against General Motors, manufacturer of the Blazer, in Missouri state court. The case was removed to federal court based on diversity of citizenship. Plaintiffs claimed that the Blazer was defective in that its electric fuel pump allegedly continued to pump fuel to the engine after impact; that the fuel started the fire in the

engine compartment; and that the fire, rather than the impact, caused Ms. Garner's death. General Motors vigorously denies that the fuel pump was faulty or that it caused the fire, and also has defended on the ground that Ms. Garner died from injuries sustained in the impact of the collision. Pet. App. 3a.

The case has yet to be tried on the merits. Rather, in the first trial, on the basis of alleged discovery violations, the District Court entered an extraordinary default sanction against General Motors, predetermining the pivotal issues of defect and causation. After an abbreviated trial of the few remaining issues, the jury returned a verdict for the plaintiffs. On appeal, the Eighth Circuit reversed, agreeing with General Motors that the trial court's draconian sanction was not justified. Pet. App. 10a. The case is thus poised to return to the District Court for a new trial.

B. The Michigan Injunction.

One of petitioners' witnesses at the abbreviated trial was Ronald Elwell. During the last 18 years of his career at General Motors, Elwell worked almost exclusively as an integral member of the in-house litigation team whose primary function was assisting General Motors' lawyers in defending products liability cases. J.A. 12-13, 18-22. In this capacity, Elwell was necessarily and regularly afforded access both to General Motors' proprietary trade secret information and to its privileged attorney-client communications and litigation work product. *Id.* Elwell's involvement with litigation matters was so pervasive that he has admitted it is virtually impossible for him to distinguish what he knows about General Motors only from privileged sources and what he knows from other sources. *Id.* at 13.

In 1987, after numerous disagreements about the terms of his employment, Elwell was placed on an unassigned status that paid him $4,440.47 per month for 28 months (after which he would be eligible to retire) and allowed him to seek outside

employment as an expert litigation witness (for General Motors and others), provided that he did not breach any of his continuing fiduciary duties to General Motors. J.A. 13-14, 22. At the end of this unassigned status, General Motors considered Elwell retired, but Elwell refused to execute the retirement papers. In 1991, Elwell sued General Motors in Michigan state court, seeking damages on various employment claims.

A few months before he filed that suit, Elwell had been deposed in a Georgia case brought *against* General Motors. Over General Motors' objections, he gave testimony that wrongfully disclosed General Motors' privileged attorney-client information and attorney work product. *See* J.A. 23-28. Moreover, when he produced five boxes of material in response to a subpoena, it became apparent that he had misappropriated hundreds of documents from General Motors -- documents containing attorney-client communications, attorney work product, and confidential trade secret information. J.A. 14-16; 25-28.

To prevent further violations of its privileges, General Motors counterclaimed in Elwell's Michigan lawsuit and immediately sought a preliminary injunction. Two court days were devoted to a full adversarial hearing in which both sides presented testimony and argument. Based on the episode at the Georgia deposition and other evidence, General Motors demonstrated that Elwell had already violated his duty to maintain its privileges and was likely to do so again. J.A. 9.

After hearing the evidence, the Michigan court enjoined Elwell from disclosing any of General Motors' confidential trade secret information or any matters protected by its attorney-client or work-product privileges. J.A. 9-10. The court ruled that General Motors had "met its burden of proving that: (a) If the relief requested was not given [General Motors] could suffer irreparable injury; (b) There is no adequate remedy at law; (c) Public policy weighs in favor of the issuance of the

injunction; (d) There is a likelihood of success on the merits of the claim." *Id.* at 10. The court thus concluded that Elwell posed a continuing threat to General Motors' legal privileges.

Nine months later, General Motors and Elwell resolved their dispute and entered into 30 binding stipulations. *See* J.A. 11-17. In a stipulation critical here, Elwell acknowledged that his close working relationship with General Motors' lawyers permeates everything he learned during his employment. His pervasive experience as an in-house litigation consultant *makes it "extremely difficult for [him] to determine whether his knowledge with respect to GM only comes from attorney-client and work product communications or from non-privileged communications."* *Id.* at 13 (emphasis added). He also acknowledged "that he owes GM a fiduciary duty not to disclose its confidential information, trade secrets, attorney-client communications, or work product." *Id.* at 16.

In view of these stipulations, Elwell consented to a permanent injunction barring him from testifying against General Motors in products liability actions without General Motors' consent and from consulting with attorneys in such cases. J.A. 16-17. He also agreed to return all confidential and privileged documents relating to General Motors' business. *Id.* at 17.

Based on the entire record before it -- including transcripts from the two-day evidentiary hearing, the findings supporting the preliminary injunction, and the parties' stipulations -- the court entered a permanent injunction. The court expressly found that General Motors had "met the requirements for permanent injunctive relief." J.A. 30. As the court explained:

> Specifically, [General Motors] has met its burden in establishing that if Plaintiff disclosed various forms of privileged information he possesses [it] would be irreparably harmed. Second, [General Motors] has established its burden of showing that its remedy at

> law is inadequate. Third, [General Motors] has established that the public interest weighs in favor of granting a permanent injunction. *Id.*

The permanent injunction bars Elwell from disclosing any of General Motors' "trade secrets, confidential information or matters of attorney-client privilege or attorney-client work product" and prohibits him from "testifying, without the prior written consent of [General Motors], either upon deposition or at trial, as an expert witness, or as a witness of any kind, and from consulting with attorneys or their agents in any litigation involving [General Motors]." *Id.*[1]

C. Elwell's Efforts To Evade the Injunction.

From the day the permanent injunction was entered, General Motors has faced a consistent pattern of conduct by Elwell to evade the terms of the injunction. In fact, it is clear that Elwell has established a lucrative consulting business as an expert witness (although the character of his testimony is often disguised by labeling him a so-called "fact witness") on behalf of products liability plaintiffs suing both General Motors and other auto manufacturers.

Petitioners themselves amply highlight the magnitude of Elwell's nationwide consulting business as they list a string of cases in which plaintiffs have obtained court orders permitting him to testify without General Motors' consent -- cases in Alabama, Arizona, California, Colorado, Connecticut, Georgia, Kentucky, Mississippi, Missouri, Montana, New York, Ohio, Oklahoma, South Carolina, Texas, Virginia, and Washington, at a minimum. *See, e.g.*, Petrs. Br. 30-35. Elwell has sought to testify in other courts as well, but has been barred from doing

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[1] The permanent injunction made a single exception for the Georgia case, which, it was agreed, would be treated differently because Elwell's involvement predated the Michigan lawsuit. J.A. 30.

so.[2] What is most noteworthy about this list is that Elwell has never been permitted to testify against General Motors *in Michigan*, where the courts have consistently enforced the injunction.

Indeed, it is only by manipulating the joints in the state and federal judicial systems that Elwell has been able to dishonor his legal obligations. The injunction plainly bars Elwell from testifying in a case against General Motors. But the plaintiffs for whom Elwell testifies go to great lengths to convince other courts that they can ignore the Full Faith and Credit Clause and effectively override the Michigan judgment by ordering Elwell to testify.[3] Elwell, however, is obviously not a resident subject to the subpoena power of the courts in each of the jurisdictions where these cases are proceeding. When he testified in this case, for example, he resided in New Mexico. *See* Elwell Dep. at 36 (June 23, 1993). Thus, it is only by voluntarily appearing in the jurisdiction -- undoubtedly pursuant to an arrangement with plaintiffs' attorneys -- that Elwell can be subjected to the

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[2] *See, e.g.*, Pet. App. 35a. The most recent examples of cases in which Elwell has been prohibited from testifying because other courts were willing to accord full faith and credit to the Michigan injunction are *France v. General Motors Corp.*, No. CV-95-321 (Ala. Cir. Ct. June 11, 1997), and *Pharo v. General Motors Corp.*, No. 94-5104 (E.D. Pa. Mar. 10, 1997).

[3] Elwell undoubtedly seeks to have courts "order" his testimony to take advantage of an undertaking made by General Motors. When General Motors and Elwell were settling the Michigan lawsuit, they recognized that some courts might erroneously fail to give full faith and credit to the injunction concluding their suit. In light of the Catch-22 situation that such an erroneous ruling might create for Elwell, General Motors agreed that it would not bring an action against Elwell if he testified subject to an order from another court. Pet. App. 5a. Elwell's transparent efforts to make himself available to be "ordered" to testify are a means of wrongfully exploiting that undertaking. But this private undertaking by General Motors has no effect on the scope of the injunction itself, which makes no exception for cases in which another court orders Elwell to testify. *See* J.A. 30-31.

authority of these courts at all. *See id.* at 209-11 ("[H]e has come here and allowed himself to be subpoenaed and to bring himself within the subpoena power of this Court.").[4] If Elwell merely sat at home and refused to cooperate with plaintiffs, courts from Alabama to Washington would be powerless even to contemplate "ordering" his testimony, and the full faith and credit issue would rarely, if ever, arise.

The motivation behind Elwell's extensive activity is also clear enough. In a recent case, he stated that when he testifies for plaintiffs against General Motors, his standard arrangement is to require reimbursement for his "loss of business opportunity" at a rate of $300 per hour. *See* Trial Transcript, *Stephens v. General Motors Corp.*, No. 36740 (Cal. Super. Ct. May 21, 1997) at 3502-03 (Appendix B).[5]

Elwell's activities also belie petitioners' unfounded charge that General Motors has something to hide. Since the injunction was issued, Elwell has been deposed by the National Highway Traffic Safety Administration, which declined to take any action based on Elwell's testimony.[6] And just two months ago, Elwell testified extensively against General Motors in a products liability case. *See Stephens*, *supra*. The jury returned

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[4] In this case, Elwell received service of a subpoena at a downtown hotel in Kansas City, Missouri, the day before the plaintiff's attorneys had scheduled his deposition to be taken in Kansas City. *See* Elwell Subpoena (Appendix A).

[5] As this high rate suggests, whatever plaintiffs choose to label Elwell (they typically go to great lengths to label him a "fact witness"), it is clear that Elwell is a paid witness or consultant. Moreover, plaintiffs stated on the record in this case that the reason they seek to inquire of him is that they view him as an "expert on GM fuel systems." *See* Petrs. Br. 7; Pet. App. 22a.

[6] The fact that Elwell has already been extensively deposed by the relevant government safety enforcement agency eviscerates petitioners' claims that review by this Court is necessary to decide important issues about silencing "whistleblowers."

a complete defense verdict, thus further confirming that Elwell's testimony does not credibly establish any untoward conduct by General Motors.

D. Further Proceedings in the Michigan Courts.

In contrast to courts in other jurisdictions, the Michigan courts have consistently enforced the injunction, reaffirming two important principles under Michigan law. *First*, the injunction is a binding, final resolution of the litigation between Elwell and General Motors that bars Elwell from testifying without General Motors' consent. *Second*, any attempt to modify or vacate the injunction must be brought before the court that issued it.

The first principle was reaffirmed by Elwell's own efforts to modify the injunction. Only two months after the judgment was entered, Elwell moved to modify the injunction so that it would prohibit him only from voluntarily testifying against General Motors, but would not prevent him from testifying subject to a court order. General Motors opposed his motion, and the trial court, adhering to its prior order, denied Elwell's request. *See* Order, *Elwell v. General Motors Corp.*, No. 91-115946-NZ (Mich. Cir. Ct. Nov. 2, 1992) (Appendix C).

The second principle -- that any effort to modify or vacate the injunction must be brought to the court that issued the injunction -- has been confirmed in two separate actions brought in other Michigan trial courts. In each case, the plaintiffs in a products liability action against General Motors raised the same claim pressed by petitioners here -- that the injunction should not bar them from obtaining Elwell's testimony and that Elwell should be ordered to testify. Under Michigan law, however, only the issuing court can enter such an order effectively modifying the injunction. *See* Mich. Ct. R. 2.613(B) (judgment may be set aside or vacated "only by the judge who entered the judgment or order, unless that judge is absent or unable to act").

As a result, in each case, the trial court denied the plaintiffs' motions to alter the injunction. Instead, refusing to arrogate to themselves that authority, the other Michigan courts recognized that such relief should be sought *from the court that issued the injunction in the first place*. *See* Order and Transcript, *Brisboy v. General Motors Corp.*, No. 94-77688-NP (Mich. Cir. Ct. Nov. 9, 1995) (Appendix D); Order, *McLain v. General Motors Corp.*, No. 93-465507-NP (Mich. Cir. Ct. Mar. 3, 1996) (Appendix E).

E. The Decisions Below.

In this case, following the typical pattern, plaintiffs sought an order from the District Court permitting Elwell's deposition, and Elwell went to Missouri and was served with a subpoena. *See supra* note 4. General Motors opposed petitioners' motion, stating that the Michigan injunction must be afforded full faith and credit. The District Court, however, held that the Full Faith and Credit Clause and Statute did not require it to enforce the injunction for two reasons: *first*, the injunction violated Missouri public policy as embodied in the state discovery rules; and *second*, the injunction was subject to modification by the issuing court in Michigan and hence could be freely revised by any other court. Pet. App. 22a-29a. Petitioners did not raise and the District Court did not decide any due process issue.

On appeal, General Motors argued that there was no such thing as a "public policy" exception to full faith and credit, that the injunction does not violate public policy in any event, and that the mere fact that the injunction could be modified by the issuing court does not deprive it of full faith and credit. *See* J.A. 34-38. Petitioners addressed only the same points; again, they raised no due process claim. *See id.* at 47-49.

The Court of Appeals held that the District Court erred in not giving the injunction full faith and credit. Pet. App. 13a-16a. For purposes of resolving the case, the Court of Appeals assumed *arguendo* that there *was* a public policy exception to

the full faith and credit command and went on to conclude that the Michigan injunction did not offend Missouri public policy because Missouri law contains a "public policy in favor of full faith and credit" that is "equally strong" as its policy in favor of full discovery. *Id.* at 14a. In addition, the Court of Appeals held that the controlling command of full faith and credit cannot be evaded merely because an injunction may be subject to modification by the issuing court, particularly where the complaining party has not sought modification from that court. *Id.* at 14a-16a. The Court of Appeals did not address any due process claim, because none had been raised.[7]

On March 24, 1997, the Court granted *certiorari* to decide whether the Michigan injunction should be afforded full faith and credit in this case.

SUMMARY OF ARGUMENT

Petitioners' arguments in this Court bear scant resemblance to the issues presented below. Indeed, two of their claims were neither raised before nor addressed by the Court of Appeals, *see infra*, §§ II, IV, and the third merely repackages a contention that the Court of Appeals assumed *arguendo* in petitioners' favor, *see infra*, § III. Moreover, petitioners make no attempt to address the dispositive issue of state law *actually decided by the Court of Appeals* -- namely, that the Michigan injunction does not violate Missouri public policy. Even considered on the merits, however, petitioners' new arguments do not withstand scrutiny.

1. Petitioners' most ambitious attack is a belated attempt to cast doubt on whether the Full Faith and Credit Clause and its implementing statute apply to injunctions at all. Nothing in the text, history, or purpose of the Clause, however, can

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[7] In fact, petitioners never raised their due process claim until their petition for rehearing in the Court of Appeals. That petition was denied without opinion.

remotely support an exemption for injunctions. By their plain terms, the Clause and its implementing statute apply to all "judicial Proceedings" -- a term that encompasses any judgment, whether embodied in a monetary award or an injunctive decree.

2. While they now demote it to second-tier status, petitioners also continue to press their claim for a "public policy" exception, though they make no effort to address the narrow holding below: that the injunction does not violate *Missouri* public policy.

It has long been settled that there is no "public policy" exception to the command of full faith and credit for judgments. *See Fauntleroy v. Lum*, 210 U.S. 230 (1908). Petitioners' effort to evade that rule by claiming that they seek only a "narrower" exception to protect "systemic interests in the integrity of judicial proceedings," Petrs. Br. 18, is simply a transparent attempt to repackage their public policy argument under a different label. In any event, it is absurd to suggest that an injunction that will have the incidental impact of making a single witness unavailable for a trial will somehow undermine the "institutional integrity" of judicial proceedings.

Petitioners' remaining assertions -- their sensational claims that the injunction allows General Motors to "purchase" Elwell's "silence" and deprives the public of "every man's evidence" -- are nothing but collateral attacks on the merits of the injunction based on petitioners' policy views. Crediting such arguments would mean abandoning this Court's settled precedents rejecting a policy exception to the Clause.

Petitioners' claims, moreover, rest on a grossly distorted picture of the grounds for the injunction and its broader implications -- a picture flatly contrary to the record established in Michigan. Their claims demonstrate perfectly the wisdom of the Full Faith and Credit Clause, which precludes litigants from resorting to an alternative tribunal, unfamiliar with proceedings in the original cause, to attack a state court judgment.

3. Lastly, what petitioners now trumpet as their "primary" argument is simply a red herring. In a claim that they did not even raise until their petition for rehearing below, they now argue that it would violate due process to afford the injunction full faith and credit because they were not parties to the Michigan suit. Even if this new-found argument is properly before the Court, it lacks merit for three reasons.

First, petitioners' desire to have Elwell testify does not rise to the level of a property interest protected by the Due Process Clause. In this regard, petitioners' central reliance on cases in the line of *Martin v. Wilks*, 490 U.S. 755 (1989), is entirely misplaced. While *Wilks* held that a judgment cannot conclude the *rights* of persons not made a party to the action, the right involved there was an independent cause of action guaranteed under federal law. Here, it cannot be seriously contended that enforcing the Michigan injunction would deprive petitioners of a cause of action or any other constitutionally protected interest.

Second, even if petitioners had a protected interest in Elwell's testimony, applying the Full Faith and Credit Clause would not violate due process. Affording the injunction the *same respect* that it would receive in the courts of the rendering State simply requires petitioners to raise their claims for access to Elwell's testimony -- which necessarily require altering the injunction -- in the Michigan court that issued the original decree. Directing petitioners to raise their arguments in that forum, however, merely ensures an orderly procedure and raises no due process concern whatsoever. And there can certainly be no basis for striking down the Michigan rule of procedure that (through principles of full faith and credit) gives the injunction this forum-selection effect against petitioners, especially where the constitutionality of the rule was never considered by either court below. Nevertheless, declaring that state rule unconstitutional would be precisely the consequence of accepting petitioners' new due process claim.

Third, even assuming, *arguendo*, that enforcing the injunction would mean that petitioners are "bound" by it, rather than merely affected by it, their due process claim fails even on its own terms. Under settled law, and consistent with due process limitations, the Michigan injunction binds not only parties, but also persons with notice of the order who act in concert or participation with the parties. Here, it seems clear that Elwell was acting under some arrangement with petitioners' trial counsel when he received service of a subpoena in Missouri for a deposition there. Petitioners themselves thus may be bound directly to honor the terms of the injunction because they have been acting in concert with Elwell to aid and abet his efforts to violate the decree.

ARGUMENT

Before turning to petitioners' specific attempts to evade the commands of full faith and credit, we briefly set forth the history and core objectives of the constitutional provision at the heart of this case -- topics that petitioners studiously ignore.

I. THE HISTORY AND PURPOSE OF FULL FAITH AND CREDIT.

In the Full Faith and Credit Clause, the Framers confronted the critical problem of binding the independent court systems of the separate States into a workable system for dispensing justice in a unified nation. If left unmodified in the Constitution, the principles of the common law would have ensured that each State would be free to treat the judicial decision of another State with no greater respect than was accorded to the judgment of a foreign nation. *See M'Elmolye v. Cohen*, 38 U.S. (13 Pet.) 312, 325 (1839); 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1302, at 177 (1833); *see also Walker v. Witter*, 1 Doug. 1, 99 Eng. Rep. 1 (1778) (at common law, foreign judgments were regarded solely as *prima facie* evidence of the matter adjudicated and not given conclusive effect).

That loose rule, however, would have produced perpetual disruptions in the administration of justice, for as James Madison pointed out, particularly along the borders between States, it would ensure that judgments were never final, but could be evaded by the simple expedient of crossing a state line. THE FEDERALIST No. 42, at 271 (Clinton Rossiter ed. 1961). Such a result was incompatible with the Framers' plan of establishing a Union in which the States would "no longer be foreign to each other in the sense that they had been," and the Framers thus determined that "for the prosecution of rights in Courts" there must be "an end to the uncertainty upon the subject of the effect of judgments obtained in different states." *M'Elmoyle*, 38 U.S. (13 Pet.) at 325.

The Continental Congress had pointed the way toward a solution to this problem by including a clause in the Articles of Confederation providing that "[f]ull faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistracies of every other State." ARTICLES OF CONFEDERATION art. IV., cl. 3. With little discussion, the Framers expanded on this terse provision by providing more definite means for its implementation:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof. U.S. CONST. art. IV, § 1.

In Madison's view, one of the chief benefits of this provision as an "instrument of justice" was that it conferred upon Congress the power to define with greater specificity the precise respect that courts were required to accord to another State's judgment. THE FEDERALIST No. 42, at 271. And it is an apt reflection of the importance of the Clause to the new Union that the First Congress lost no time in exercising this authority.

In 1790, Congress commanded, in the same broad terms used by the Clause itself, that all "judicial proceedings . . . shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the State from whence the said records are or shall be taken." Act of May 26, 1790, ch. 11, 1 Stat. 122.[8]

This Court soon made it clear that the measure of full faith and credit declared by Congress would be given complete effect: under the Full Faith and Credit Statute, every State must give the judgment of another State the same force and effect it would have under the local laws of the rendering State. *See Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1813). As Justice Story explained for the Court, the proper inquiry in every case under the Clause is this: "what is the effect of a judgment in the state where it is rendered." *Id.* Shortly thereafter, Chief Justice Marshall reaffirmed this doctrine, declaring for a unanimous Court that "the judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced." *Hampton v. M'Connel*, 16 U.S. (3 Wheat.) 234, 235 (1818).

As a result, the Court firmly established that a judgment, conclusive where rendered, cannot be reexamined by any other federal or state court, but rather is "conclusive in the courts of all other States wherever the same matter is brought in controversy." *Christmas v. Russell*, 72 U.S. 290, 305 (1866). Through steady enforcement of the full faith and credit command, this Court has ensured that the Clause will achieve its purpose, of "weld[ing] the independent states into a nation by giving judgments within the jurisdiction of the rendering state

[8] This provision, with only minor amendments over the ensuing two hundred years to cover the territories and possessions of the United States, is now codified at 28 U.S.C. § 1738 (1994).

the same faith and credit in sister states as they have in the state of the original forum." *Johnson v. Muelberger*, 340 U.S. 581, 584 (1951).

II. THE FULL FAITH AND CREDIT CLAUSE AND ITS IMPLEMENTING STATUTE APPLY TO INJUNCTIONS.

Petitioners' broadest attack on principles of full faith and credit is a muted suggestion that the constitutional command does not apply to injunctions. *See* Petrs. Br. at 25. Petitioners never raised this argument below, and even in this Court they stop short of claiming a blanket exemption for injunctive decrees. *See id.* at 25-26. Nevertheless, because their attempt to muddy the waters on this point is logically antecedent to their other efforts at evading full faith and credit, we address it first.

There is no basis in the text, history, or purpose of the Full Faith and Credit Clause for an exception for injunctions. To the contrary, both the Clause and its implementing statute demand in the broadest terms full faith and credit for all "judicial Proceedings." U.S. CONST. art. IV, § 1; *see also* 28 U.S.C. § 1738. That expansive terminology encompasses both monetary judgments *and* injunctive decrees.

Indeed, the term "judicial Proceedings" stands in marked contrast to narrower language used elsewhere in the Constitution. The Framers inherited a legal system that strictly separated equitable actions (where an injunction might be obtained) from actions at law, and at points the Constitution explicitly acknowledges that division. *See, e.g.*, U.S. CONST. art. III, § 2 (the judicial power extends "to all Cases, in Law and Equity"); *id.* amend. VII (guaranteeing right to jury trial only "in suits at common law"). The absence of any similar distinction in the Full Faith and Credit Clause confirms that the unrestricted command of full faith and credit for all "judicial Proceedings" was intended to extend in full measure to decrees of courts of equity, including injunctions.

In light of the clear constitutional text, this Court has never refused to apply the Clause in cases that arise in equity. To the contrary, the Court has applied the Clause to decrees of divorce, *see, e.g., Cheever v. Wilson*, 76 U.S. (9 Wall.) 108, 109 (1869); to the decisions of probate courts, *see, e.g., Simmons v. Saul*, 138 U.S. 439 (1891); and to proceedings brought in state insolvency courts, *see, e.g., Crapo v. Kelly*, 83 U.S. (16 Wall.) 610 (1872). Indeed, as recently as two Terms ago, this Court applied the Clause to a consent decree entered by the Delaware Court of Chancery in a suit alleging claims for breach of fiduciary duty and waste of corporate assets -- classic equitable claims. *See Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 876 (1996).[9]

Reading the Clause to exclude injunctive decrees would manifestly frustrate its core objectives. The Clause would have proved a feeble instrument of federalism if all rights determined on the equity side of courts escaped its protection. Indeed, if anything, guaranteeing full faith and credit for injunctions is especially critical for fulfilling the Clause's purposes. After all, an injunction will issue only after a court first determines that the complainant lacks an adequate remedy at law and that a more specialized remedy is required to prevent irreparable harm. That is the case here; as the Michigan court found, General Motors would suffer irreparable harm if Elwell remained at liberty to reveal privileged information. *See* J.A. 30; *see also, e.g., Admiral Ins. Co. v. United States Dist. Ct.*, 881 F.2d 1486, 1491 (9th Cir. 1988). There is no basis in law or logic for

[9] Although the question now appears to arise infrequently, lower courts have also held that the Clause applies to injunctions. *See, e.g., Gouveia v. Tazbir*, 37 F.3d 295, 300-01 (7th Cir. 1994); *Southeast Resource Recovery Facility Auth. v. Montenay Int'l Corp.*, 973 F.2d 711, 713 (9th Cir. 1992); *Rozan v. Rozan*, 317 P.2d 11, 15-16 (Cal. 1957) (Traynor, J.) ("There is no sound reason for denying a decree of a court of equity the same full faith and credit accorded any other kind of judgment.").

suggesting that, precisely in cases where the potential harm is greatest, the Clause's protection is lacking. Such a rule would defeat the Clause's central objective of ensuring that a judgment obtained in one State would be enforceable throughout the Nation.

Finally, nothing in the modifiable nature of injunctive decrees warrants withdrawing the protections of the Clause. In particular, as the Eighth Circuit recognized, the mere fact that a permanent injunction may be subject to modification in no way alters its character as a final adjudication of legal interests entitled to full faith and credit. To the contrary, every final judgment is subject to being reopened or modified in appropriate circumstances, *see* Fed. R. Civ. P. 60(b); yet the nonrigidity of judgments has never been thought to hinder full faith and credit protection.[10]

[10] Petitioners incorrectly claim that this Court has "opined that an injunction can have 'no extraterritorial operation' under the Full Faith and Credit Clause." Petrs. Br. 26. That both misstates the law and misrepresents the holding in *Lynde v. Lynde*, 181 U.S. 183 (1901). Far from making a general pronouncement about the extraterritorial operation of injunctions, *Lynde* held only that specific "provisions for bond, sequestration, receiver, and injunction" included in an alimony decree for purposes of enforcement in case of default could "have no extraterritorial operation" because they were "in the nature of execution and not of judgment." *Id.* at 187. That ruling implies no peculiar limitation on enforcing injunctions; it simply restates the general rule that a plaintiff must take the machinery for executing any judgment as he finds it in the forum State. *See, e.g., M'Elmoyle*, 38 U.S. (13 Pet.) at 325. Contrary to petitioners' suggestions, it is settled law that a court can enter an injunction that will affect a party's conduct even outside the court's territorial jurisdiction. *See Cole v. Cunningham*, 133 U.S. 107, 116-19 (1890); *Massie v. Watts*, 10 U.S. (6 Cranch) 148, 157 (1810) (Marshall, C.J.).

III. PETITIONERS' CLAIMS THAT FULL FAITH AND CREDIT MUST "YIELD" TO OVERRIDING POLICY CONCERNS ARE MERITLESS.

In the court below, petitioners' primary argument was that there is a "public policy" exception to full faith and credit, and that the Michigan injunction "[v]iolates Missouri [p]ublic [p]olicy" favoring "full and fair discovery." J.A. 49. The Eighth Circuit found it unnecessary to decide whether there is a public policy exception; instead, assuming *arguendo* that such an exception exists, the court held only that giving the Michigan injunction full faith and credit did not violate *Missouri public policy*. *See* Pet. App. 13a-14a. Petitioners have not even attempted to upset the holding on that narrow question of *state* law, which was dispositive of the public policy claim presented to the Court of Appeals. This Court thus has no need to reach petitioners' repackaged version of their public policy claims to affirm the judgment below. *Cf. Pembaur v. Cincinnati*, 475 U.S. 469, 484 n.13 (1986) ("We generally accord great deference to the interpretation and application of state law by the courts of appeals.").

Even on the merits, however, petitioners' public policy claims fail.

A. There Is No Public Policy Exception to the Command of Full Faith and Credit for Judgments.

In *Fauntleroy v. Lum*, 210 U.S. 230 (1908), this Court squarely established that courts cannot refuse recognition to another State's judgment on the ground that enforcing it would violate public policy in the forum State. *See id.* at 236-37. Indeed, the Court declared this rule in the strongest terms. In *Fauntleroy*, a Missouri court had awarded a judgment on a gambling transaction entered into in Mississippi. Even though the original transaction had been *illegal* in Mississippi and could not have been sued upon there, this Court held that after the claim had been reduced to judgment in Missouri, Mississippi

courts were no longer free to enforce Mississippi policy but instead were bound to accord full faith and credit to the Missouri judgment. *See id.*

Since *Fauntleroy*, the Court has repeatedly rejected the notion that the Clause leaves room for any "public policy" exception to judgments.[11] Indeed, the Court recently reiterated that the "full faith and credit clause requires a state court . . . to enforce a judgment recovered in another state, although it might have refused to entertain a suit on the original cause of action as obnoxious to its public policy." *Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990) (quotations omitted). *Accord Roche v. McDonald*, 275 U.S. 449, 452 (1928) (a "judgment, if valid where rendered, must be enforced [by another] State although repugnant to its own statutes"); *Kenney v. Supreme Lodge*, 252 U.S. 411, 414-15 (1920) (same).[12]

The reasons for the Court's consistent refusal to recognize any policy exception are clear: ensuring that the command of full faith and credit overcomes the parochial policy interests of different States is vital for securing the Clause's central

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[11] There are only two narrow situations, in fact, in which the Court has held that a State may not be obliged to give full effect to a valid judgment from another State: judgments based on penal laws, *see, e.g., Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888), and judgments purporting directly to affect title to land in another state, *see, e.g., Olmsted v. Olmsted*, 216 U.S. 386, 393-94 (1910). Neither exception is relevant to this case.

[12] *See also Restatement (Second) of Conflict of Laws* § 117 cmt. b (1971) ("[F]ull faith and credit requires that [a valid judgment] be recognized and enforced in a sister State even though the original claim is contrary to the strong public policy of the sister State."); Hon. Ruth Bader Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 Harv. L. Rev. 798, 805 n.35 (1969) ("The Supreme Court has consistently held that a state may not, by reason of its own social or economic policy, refuse to recognize a sister state's judgment. State policy must yield to the federal policy requiring uniform judgment recognition throughout the nation.").

objective. The very "*function* of the Full Faith and Credit Clause is to resolve controversies *where state policies differ*." *Morris v. Jones*, 329 U.S. 545, 553 (1947) (emphasis added). And the resolution of such conflicts demanded by the Framers in the Clause, and by Congress in the Statute, is that a judgment rendered in one State must be given full effect throughout the Nation, without regard to the preferences of other States. Any other rule would unravel the bond imposed by the Clause for "weld[ing] the independent states into a nation," and defeat its objective of ensuring that a right, once established by a judgment, would be enforceable nationwide. *Johnson*, 340 U.S. at 584. Instead, States would always be free to invent reasons for declining to give effect to judgments from other States. Enforcing the Clause in the face of such policy claims is thus essential, for "if full faith and credit is not given in that situation, the Clause and the statute fail where their need is the greatest." *Morris*, 329 U.S. at 553.[13]

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[13] An important distinction is made between cases concerning full faith and credit for *judgments* and for *statutes*. While the Court has recognized that, in the choice-of-law context, a State need not apply another State's *statutes* in violation of its public policy, *see, e.g.*, *Nevada v. Hall*, 440 U.S. 410, 422 (1978), that rule explicitly rests on unique concerns raised "in the case of statutes." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939). In such cases, barring any exception "would lead to the absurd result that . . . the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Id.* In light of such concerns, the Court has permitted a policy exception for statutes in part because -- unlike the situation with judgments -- "Congress has not prescribed" the "extrastate effect" of statutes. *Id.* at 502; *see also Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935). Such decisions have no application where the Clause is applied to judgments. *See, e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981) (plurality) (noting that "[d]ifferent considerations are of course at issue . . . outside the choice-of-law area, such as in the case of sister state-court judgments").

B. Petitioners' Claim for an Exception Based on the "Institutional Integrity" of Courts Is Baseless.

Apparently recognizing the futility of a frontal attack on the settled principle that there is no policy exception to the command of full faith and credit for judgments, petitioners repackage their argument as a claim for a "narrower" exception protecting "the integrity of judicial proceedings." Petrs. Br. 18. Relabeling does not aid petitioners' cause, and in any event, their appeals to judicial integrity are meritless.

1. Petitioners' Appeal to the "Institutional Integrity" of Courts Is Simply a Plea for a Public Policy Exception Under a New Label.

Petitioners claim that they are not advocating an exception based on "*substantive* policy," but rather only a "narrower" exception based on the forum State's "interest in the integrity of its judicial proceedings." Petrs. Br. 18 n.8 (emphasis added). This purported distinction, however, is illusory. A State's interest in controlling judicial proceedings is but one example of the limitless array of policy concerns that might be advanced to frustrate the Full Faith and Credit Clause.

Indeed, this particular policy interest is one that could *always* be invoked against the Clause. Enforcing the dictates of full faith and credit *necessarily* requires some interference with a forum State's control over its own judicial processes. The very purpose of the Clause is to ensure that the courts of the several States will not operate purely as the courts of wholly independent sovereigns, free to ignore each other's judgments, but rather more as integrated components of a unified judicial system. The Clause thus requires States both to permit actions in their courts brought upon another State's judgments, *see, e.g.*, *Kenney*, 252 U.S. at 415 ("[A] State cannot escape its constitutional obligations by the simple device of denying jurisdiction . . . to Courts otherwise competent."), and to dismiss proceedings instituted in their courts that would attempt

to relitigate matters already adjudicated elsewhere, *see, e.g.*, *Underwriters Nat'l Assurance Co. v. North Carolina Life*, 455 U.S. 691, 705-10, 715 (1982).[14]

Petitioners' effort to cloak their "public policy" exception in the guise of a distinct concern for the "institutional" interests of courts is hardly novel; indeed, it has been previously rebuffed by this Court. In *Morris v. Jones*, the Court confronted a similar claim that a Missouri judgment should not be afforded full faith and credit because it would improperly interfere with the "convenience in administration" of ongoing liquidation proceedings in Illinois courts. 329 U.S. at 553. Recognizing that such a claim was "at best only another illustration of how the enforcement of a judgment of one State in another State may run counter to the latter's policies," the Court flatly rejected it, reaffirming that, on this point, "the answer given by *Fauntleroy v. Lum* is conclusive." *Id.* (citation omitted).

Because the Court has consistently rejected any claims for policy exceptions to the Clause, it is not surprising that petitioners' discussion on this point is virtually barren of authority. The simple fact is that *no case* from this Court

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[14] Remarkably, petitioners suggest that it would unthinkable if, through the Clause's operation, one State could "commandeer" the "official processes" of another. Petrs. Br. 24. But the Clause's central function is *precisely* to require the courts of every State to respect rights established by a judgment in another State, which is the reciprocal obligation for ensuring that their own judgments will be given the same respect elsewhere. Indeed, as this Court made plain in *Fauntleroy*, the overarching imperative of full faith and credit is so central to the constitutional plan that it compels the courts of one State to enforce a judgment even if those courts would have held the right claimed in the original lawsuit to be entirely beyond the protection of their laws. *See* 210 U.S. at 236-67; *see also Kenney*, 252 U.S. at 414-15.

establishes their far-reaching brand of a "public policy" exception protecting the "institutional interests" of courts.[15]

Finally, it is clear that petitioners' supposedly "narrow" principle is so infinitely malleable that it could be used to eliminate entirely full faith and credit for injunctions. Under petitioners' theory, the "intrusive imposition on the judicial process" involved in enforcing any injunction is apparently enough in itself to warrant a blanket exemption for all injunctions from the Clause. Petrs. Br. 25. If petitioners' new exception can accomplish that ambitious result, there is no limiting principle that would prevent States from resorting to it whenever they found it undesirable to enforce a judgment from another State.

2. The Integrity of Judicial Proceedings Is Not Threatened Here.

In any event, enforcing the Michigan injunction in no way threatens the "institutional integrity" of any judicial proceedings. All manner of actions by courts -- including the determination of issues that are given *res judicata* effect, the disbarment of an attorney, or the imprisonment of a witness or party -- may have an *impact* on a proceeding in another court. But such actions have never been thought to threaten the "institutional integrity"

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[15] Virtually the only authority petitioners cite in support of this open-ended exception is section 103 of the *Restatement (Second) of Conflict of Laws*. *See* Petrs. Br. 24 n.17, 26-27. Section 103, however, is one of the most controversial sections in the *Restatement*. It has been roundly criticized for purporting to describe an exception that does not exist. *See, e.g.*, Ronald Hecker, *Full Faith and Credit to Judgments: Law and Reason Versus the Restatement Second*, 54 Calif. L. Rev. 282, 282 (1966) (explaining that the draft from which section 103 derived "is not supported by the . . . decisions on which it is founded" and that "its departure from precedent and inconsistency with constitutional policy cannot be justified"); William Reynolds, *The Iron Law of Full Faith and Credit*, 53 Md. L. Rev. 412, 438 (1994) ("[I]t is quite doubtful that Section 103 provides an accurate statement of the law.").

of the second court. In this case, in particular, precluding a single witness -- particularly a paid witness -- from testifying does not undermine the "institutional integrity" of the District Court in the least.

In this regard, petitioners' reliance on the unresolved status of anti-suit injunctions under the Full Faith and Credit Clause is wholly misplaced. Such injunctions implicate the purposes underlying the Clause in a way that the Michigan injunction does not. By demanding equal respect for all state judgments, the Constitution directs each State to presume that every other State's courts are equally capable of dispensing justice. An anti-suit injunction, however, may imply that another State's courts cannot be trusted and must be stopped by a preemptive strike before they enter a judgment that will trigger the Clause's protections. Such an injunction is thus an end-run around the very principles of mutual respect and recognition that the Clause was designed to vindicate.

Even assuming *arguendo* that an anti-suit injunction would not necessarily be entitled to full faith and credit,[16] however, it does not follow -- and much less does it follow *a fortiori* -- that the Michigan injunction should be denied the protection of the Clause because of its incidental effect in making a particular witness unavailable. Petrs. Br. 27. Even if one court may not be able *completely* to ban proceedings in another court, that rule says nothing about full faith and credit for a judgment that happens to affect the availability of only a single witness.

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[16] Contrary to petitioners' suggestions, the law on anti-suit injunctions is far from unequivocal. This Court has explicitly held that it is consistent with the command of full faith and credit for a state court to enjoin an individual from bringing a suit in another State. *See Cole v. Cunningham*, 133 U.S. 107, 117-19 (1890). And some courts have long held that in certain circumstances such orders may be enforced under the Clause. *See Dobson v. Pearce*, 12 N.Y. 156, 166-67, 170 (1854).

For similar reasons, *Donovan v. City of Dallas*, 377 U.S. 408 (1964), does not aid petitioners. There, the Court held only that a state court may not directly "enjoin litigants from prosecuting their federal-court action." *Id.* at 411. Once again, that ruling has nothing to do with the incidental effect that the Michigan injunction may have in upsetting petitioners' desire to present specific testimony from a single witness. The injunction here has in no way enjoined the prosecution of petitioners' federal action, which will proceed regardless of whether Elwell testifies. Petitioners' attempt to collapse this case into *Donovan* thus makes no sense. And their suggestion that giving the Michigan injunction full faith and credit will mean that state courts soon will be dictating which claims can be raised in federal courts is mere lawyers' hyperbole.

C. Petitioners' Other Naked Appeals to Policy Distort the Implications of Full Faith and Credit.

Unable to establish any basis in precedent for an exception, petitioners ultimately resort to a parade of horribles. Yet this Court's settled decisions rain out the parade. Indeed, if the Court's numerous decisions rejecting a public policy exception mean anything, they mean that facial appeals to policy *cannot* justify evading the constitutional command.

Petitioners also grossly distort the true implications of full faith and credit for the Michigan injunction, claiming that it would allow "wrongdoers [to] purchase the silence of whistleblowers," Petrs. Br. 23, and that the "public" would be deprived of access to "every man's evidence," *id.* at 18-19. But petitioners' lurid images of Big Business corrupting the nation's court systems with back-room deals are both wrong and irrelevant. They serve only to cloud the issues before the Court while casually denigrating the integrity of state courts across the country.

1. Petitioners' Exaggerated Fears of "Buying Silence" Rest on the Insulting Suggestion that Injunctions Are Up for Sale.

Petitioners' first attack flagrantly distorts the facts. Their insistence that General Motors has "purchase[d]" Elwell's "silence," Petrs. Br. 19, ignores reality and is a direct affront to the Michigan courts. Although Elwell's lawsuit was settled, the permanent injunction entered by the Michigan Circuit Court is manifestly *not* a private agreement. It is the final judgment of a court of law entered in a valid proceeding, and this Court has squarely held that such a consent decree is entitled to full faith and credit. *See Matsushita*, 116 S. Ct. at 877; *cf. Trendell v. Solomon*, 443 N.W.2d 509, 511 (Mich. Ct. App. 1989) (consent judgment is "a judicial act and possesses the same force and character as a judgment rendered following contested trial or motion"). Petitioners suggest that General Motors and Elwell walked into court asking for an injunction with only their own bargain to support its terms, but nothing could be further from the truth.

General Motors' counterclaims against Elwell in the Michigan suit asserted a legal entitlement to prevent him from divulging confidential information protected by the attorney-client privilege, the work-product doctrine, and trade secret law. At a two-day evidentiary hearing, General Motors proved that Elwell had pervasive access to such information during his 18 years as an in-house litigation consultant, and that he had already shown complete disregard for his fiduciary duty to protect General Motors' privileges. On the basis of this evidence, the court explicitly found that General Motors was likely to succeed on the merits, that a preliminary injunction was required to prevent irreparable harm, and that public policy favored its issuance. J.A. 10.

After the case was settled, the court entered a permanent injunction as a consent decree only after expressly determining

that General Motors "met the requirements for injunctive relief." J.A. 30. The court based its determination on the entire record, including the transcripts from the two-day evidentiary hearing, the factual findings supporting the preliminary injunction, and the parties' stipulations. *Id.* Indeed, the court again specified that General Motors had "met its burden in establishing that if [Elwell] disclosed various forms of privileged information he possesses [General Motors] would be irreparably harmed" and that "the public interest weighs in favor of granting a permanent injunction" barring Elwell from testifying against General Motors without its consent *Id.*

A key factor supporting the injunction was Elwell's inability to provide any assurance that he could voluntarily protect General Motors' privileged information. Elwell stipulated that after 18 years of working closely with lawyers in preparing cases for trial, "*it [is] extremely difficult for [him] to determine whether his knowledge with respect to GM only comes from attorney-client and work product communications or from non-privileged communications.*" J.A. 13 (emphasis added). In this situation, an injunction barring Elwell from testifying against General Motors was the only possible remedy that could adequately protect General Motors' legal rights.[17] Indeed, in similar circumstances, other courts have upheld contested injunctions imposing the exact same terms. *See, e.g., American Motors Corp. v. Huffstutler*, 575 N.E.2d 116, 119-20 (Ohio 1991).

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[17] General Motors could not adequately protect its privileges merely by interjecting objections at trials or depositions. If *Elwell himself* cannot discern when or even whether his testimony is revealing information that he learned only from privileged materials, it is impossible for an attorney unfamiliar with the entire range of privileged materials that Elwell consulted during his career to make that determination and interpose a timely objection. Instead, General Motors' attorneys would only be able to object to questions that facially delve into privileged areas. Thus, petitioners' "commitment" not to seek privileged or confidential information from Elwell, Pet. App. 22a, is worthless.

Contrary to petitioners' overstated claims, according full faith and credit here will in no way open the floodgates for employers to start striking private deals for "silencing" witnesses and having them enshrined in court orders. The insulting premise behind these claims is that any litigant can "buy" an injunction from a state court at any time, whether or not there is any legal basis for the order. To the contrary, litigants who settle their disputes can obtain further protection from the courts only if they assert a valid and legally protected interest. That is why the Michigan court reviewed the entire record to determine whether General Motors had "met the requirements for permanent injunctive relief." J.A. 30. It is thus clear that, while petitioners purport to be defending the "institutional integrity" of state courts, their dire allegations actually rest on a decidedly jaundiced view of the very courts they are supposedly championing.[18]

2. Appeals to the Public's Right to "Every Man's Evidence" Have Nothing to Do with Elwell.

Petitioners also claim that according full faith and credit to the Michigan injunction will undermine the public's interest in securing "every man's evidence." Petrs. Br. 18-19. But this claim ignores the foundation of the injunction, which was issued to protect *privileged* information. *See* J.A. 30 (consent decree); *id.* at 12-17 (stipulations); *id.* at 9-10 (preliminary injunction); *id.* at 18-28 (affidavit describing Elwell's misconduct). While it may be an "ancient proposition of law" that the government has power to compel testimony from its citizens, Petrs. Br. 18,

[18] In the same vein, petitioners' citation of various whistleblower statutes enacted to protect employees who risk their jobs to report violations of the law committed by their employers, *see* Petrs. Br. 20 & n.10, has nothing in common with Elwell, who has established a lucrative consulting business selling his services to any and all bidders for $300 per hour in direct defiance of the agreement he executed in court and the binding terms of the Michigan injunction. *See supra* pages 6-8.

it is also settled that this power has always been constrained by testimonial "privileges against forced disclosure." *United States v. Nixon*, 418 U.S. 683, 709-10 (1974). As this Court has explained, "the public . . . has a right to every man's evidence, *except for those persons protected by a constitutional, common-law, or statutory privilege.*" *Id.* at 709 (emphasis added).

Indeed, such privileges, particularly the attorney-client privilege, have an equally venerable pedigree. As this Court has recognized, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). As early as the reign of Elizabeth I, it was treated as "unquestioned." 8 WIGMORE ON EVIDENCE § 2290, at 542 (McNaughton rev. ed. 1961) (citing *Berd v. Lovelace*, 21 Eng. Rep. 33 (Ch. 1577)). Notwithstanding petitioners' strident claims, rigorous enforcement of the attorney-client privilege has long been deemed to "promote broader public interests in the . . . administration of justice," *Upjohn*, 449 U.S. at 389, even though it limits the information placed before a court.[19]

Petitioners' breathless exclamation that full faith and credit conflicts here with the public's "right" to evidence thus ignores the fact that the protection of privileged information was the basis of the judicial order barring Elwell from testifying. Petitioners embellish their appeal to "every man's evidence" with a rhetorical flourish suggesting that General Motors "purported to purchase" what "was not Elwell's to sell," Petrs. Br. 19, but *precisely the opposite is true*. It is *Elwell* who is attempting to profit by selling to *plaintiffs* across the country

[19] *See also Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (attorney-client privilege is "founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

something that is not *his* to sell: testimony that is pervasively and uncontrollably leavened with General Motors' privileged information.

The nature of Elwell's testimony, in fact, highlights yet another reason why petitioners' appeal to "every man's evidence" rings particularly hollow. Elwell knows nothing about the particular facts of any case in which he testifies against General Motors. Instead, petitioners seek to have him testify because they view him as "an expert on GM fuel systems," including "design history [and] fuel system safety." Pet. App. 22a. The so-called "right" of access to evidence, however, plainly concerns only percipient fact testimony; it has nothing to do with witnesses, like Elwell, who may have expertise that a litigant might find useful.

3. Petitioners' Collateral Attacks on the Merits of the Injunction Are Impermissible.

The flawed premise underlying petitioners' policy arguments is that the Michigan injunction sweeps too broadly because there is some neatly separable body of *non-privileged* information in Elwell's possession about which he should be permitted to testify. But petitioners cannot assume away Elwell's own admissions. Where Elwell has conceded that *even he* finds it virtually impossible to tell when or even whether he is revealing information from privileged sources, *see* J.A. 13, the injunction entered by the Michigan court was entirely proper -- no lesser remedy could suffice to protect General Motors against the prospect of irreparable harm, *see id.* at 30.[20]

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[20] In this respect, the effect of the Michigan injunction is similar to government regulations that routinely prohibit current and former employees from testifying as expert or opinion witnesses in private litigation "with regard to any matter arising out of the employee's official duties or the functions of the Department [of Transportation]." 49 C.F.R. §§ 9.7(b) & 9.9(c) (1996); *see also* 58 Fed. Reg. 6719 (Feb. 2, 1993).

More importantly, petitioners' efforts to explain why they think the injunction was not properly tailored are irrelevant for one pivotal reason: the United States District Court for the Western District of Missouri is *not* the Michigan Court of Appeals. The function of the Full Faith and Credit Clause is to preclude federal and state courts from entertaining the sort of collateral attacks that petitioners have advanced here. *See, e.g., Underwriters*, 455 U.S. at 709 & n.16; *cf. District of Columbia Ct. App. v. Feldman*, 460 U.S. 462, 482 (1983) (federal district courts are without jurisdiction to entertain collateral attacks on state court judgment); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) (same).

If petitioners believe the injunction is overbroad, they are free to go to the issuing court in Michigan to press their arguments for access to Elwell's testimony (and to appeal any adverse ruling). Their failure to follow that course, however, gives them no license to claim that the District Court should ignore the dictates of full faith and credit and entertain their collateral attack upon the Michigan judgment.

Indeed, petitioners' policy arguments aptly demonstrate why the Clause precludes a second forum from entertaining such collateral attacks. The parties here harbor radically different views of the facts underlying the Michigan judgment. Petitioners believe that Elwell can and will protect privileged information, that the injunction is overbroad, and that General Motors effectively "purchased" Elwell's "silence." The record from the Michigan proceedings, however, establishes that Elwell will not (and cannot) distinguish between privileged and non-privileged information, that the injunction is vital to protect General Motors' privileges, and that the parties settled the case

in recognition that the injunction was appropriate and the monetary terms were fair.[21]

The Michigan court that issued the injunction is best placed to resolve these competing views. *And that is precisely why petitioners want to avoid bringing their claims to that court.* They perceive that they have a much better chance of upsetting the injunction if they can make unsubstantiated allegations in a second forum that has never heard the evidence. The very purpose of the Full Faith and Credit Clause, however, is to prohibit such end-runs. *See, e.g., Underwriters*, 455 U.S. at 715 (explaining that the Clause was "designed to prevent" "two state courts from reaching mutually inconsistent judgments on the same issue").

IV. ACCORDING FULL FAITH AND CREDIT TO THE MICHIGAN INJUNCTION DOES NOT VIOLATE DUE PROCESS.

What petitioners now label their "primary" argument is properly treated last because it is, in reality, an eleventh-hour diversion – as evidenced by the fact that petitioners never even bothered to raise this claim until their unsuccessful petition for rehearing in the Court of Appeals.[22] Under this theory, petitioners now claim that it would violate the Due Process Clause to accord full faith and credit to the Michigan injunction because they were not parties to that litigation. *See* Petrs. Br. 12-18. One need only scratch the surface of this new claim to discern its lack of merit. Indeed, it suffers from three critical

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[21] The District Court below has no knowledge of these background facts, which entirely refute petitioners' unsubstantiated characterization of the events underlying the Michigan injunction.

[22] Under Eighth Circuit law, that was "far too late in the day for [petitioners] to raise [a] new claim of error." *Jamestown Farmers Elevator, Inc. v. General Mills, Inc.*, 552 F.2d 1285, 1296 (8th Cir. 1977).

errors, each of which would have been exposed if the claim had been tested below.

A. Precluding Petitioners' Claims to Elwell's Testimony Would Not Violate Due Process.

Petitioners' exaggerated due process claims are flawed from the outset for the simple reason that petitioners do not have any sufficiently substantial "liberty" or "property" interest in obtaining the testimony of a single witness -- particularly a paid expert such as Elwell -- to trigger formal due process protection even if affording the injunction full faith and credit would mean foreclosing their hope to have Elwell testify.

It is axiomatic that due process protections are triggered only upon a deprivation of a protected interest in life, liberty, or property. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). Petitioners' claimed interest in obtaining Elwell's testimony implicates no interest in life or liberty, and thus the only question is whether the Court should recognize a brand-new property interest in securing a particular witness's testimony.

The cases on which petitioners rely, however, do not remotely establish any such novel category of property interest. Petitioners cite cases in the line of *Martin v. Wilks*, 490 U.S. 755 (1989), for the commonplace rule that a person may not be bound by a judgment *in personam* in a case to which he was not made a party. *See* Petrs. Br. 12-15. But in *Wilks*, the Court held only that a group of white firefighters could not have the merits of a cause of action for employment discrimination foreclosed by a consent decree in litigation between others. *See* 490 U.S. at 761-63. Although the Court encapsulated the result by saying that the consent decree could not "conclude the rights of strangers," *id.* at 762, the only "right" at issue was a cause of action. Indeed, in all of these cases, the essential concern relates to the elimination of a cause of action, which petitioners recognize is a property interest protected under the

Due Process Clause. *See* Petrs. Br. 16 n.7 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)).

Petitioners cannot lay claim to that rule, however, because they are not being deprived of their cause of action. Even if giving the injunction full faith and credit meant foreclosing petitioners' access to Elwell, the "deprivation" would consist only of one witness's testimony. Nothing in *Wilks* or any other case cited by petitioners remotely suggests that *that* "interest" must receive the same solicitude as a constitutionally protected property interest in a cause of action.[23]

Indeed, recognizing that this case is a far cry from *Wilks*, petitioners strain to assert that enforcing the injunction would actually foreclose two distinct interests -- both their interest in obtaining Elwell's testimony and their interest in pursuing their "claim of liability" against General Motors. Petrs. Br. 16. Despite petitioners' contrived claims, however, depriving a litigant of a single potential witness is not tantamount to foreclosing a cause of action. Indeed, petitioners' efforts to equate access to Elwell with their very ability to maintain their action are particularly bold, since Elwell has no knowledge about the particular facts of petitioners' case -- far less any unique knowledge. The testimony petitioners elicited from him in the first trial primarily concerned his opinions about the principles of gasoline combustion and the design of General Motors' fuel systems -- testimony based entirely on his work as an in-house litigation consultant. *See* Pet. App. 22a; J.A. 19-22. *See also* Tr. 388-397.[24] In short, petitioners' suggestion that

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[23] *Wilks* itself, in fact, did not explicitly rest on a due process holding; instead, it concerned only the proper interpretation of Rules 19 and 24 of the Federal Rules of Civil Procedure.

[24] One of petitioners' *amici* also unintentionally acknowledges that Elwell's testimony is not unique; he is only one of a "number of persons who can testify (continued...)

their right to pursue their action is somehow inseparable from their ability to obtain Elwell's testimony is nothing but a transparent attempt to bootstrap an unprotected *desire* to have Elwell testify into a *property interest* that might come within the rule of *Wilks*.

In reality, the *only* interest at stake here is petitioner's hope that Elwell will testify. But civil litigants do not have a due process right to testimony from particular witnesses; instead, they are routinely prevented from presenting exactly the witnesses they would prefer. Whenever a potential witness is retained by the opposition, or a willing witness is unavailable on the trial dates, or an unwilling witness is outside the subpoena power of a court, a party may simply be unable to obtain the desired testimony from that witness. In certain instances, this omission may even prove fatal to that party's action. Yet requiring a party to litigate a case without being able to present all the witnesses it wanted has never been thought to violate the Due Process Clause. In fact, petitioners' claims would turn the Constitution on its head, for it is only in the criminal context that the Framers guaranteed, in the Sixth Amendment, the right to compulsory process for obtaining witnesses. *See* U.S. CONST. amend. VI, cl. 4.

The Court has made it clear that the mere existence of rules generally providing for discovery or access to potential evidence does not create a distinct property interest protected by due process. In *United States v. Augenblick*, 393 U.S. 348 (1969), for example, the defendant in a court martial claimed that he had

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[24] (...continued)
with expertise on the design of the GM fuel pump system," Brief of Ass'n of Trial Lawyers of Am. 3-4, including other General Motors engineers who were available to be deposed in this case. Moreover, as the defense verdict in the recent *Stephens* case attests, Elwell's testimony is hardly indispensable in proving plaintiffs' products liability claims against General Motors. *See supra* pages 8-9.

been denied due process by the government's failure to turn over a tape recording of his statements, which it was required to do under the Jencks Act, 18 U.S.C. § 3500. This Court cautioned that, even though this statutory infraction had deprived the defendant of access to the evidence, it was error for the claim of a right of access to particular evidence to be "elevated to a constitutional level" and deemed a violation of the Due Process Clause. *Id.* at 356. To the contrary, such an infraction would rise to a due process violation only where it produced, overall, a "constitutionally unfair trial" -- that is, a trial "where the barriers and safeguards are so forgotten that the proceeding is more a spectacle or trial by ordeal than a disciplined contest." *Id.* (citations omitted).

The same basic principle is reflected throughout the law of *habeas corpus*. Although defendants frequently complain that they are denied due process by being forced to conduct their defense without particular testimony or evidence, courts have never suggested that the Due Process Clause protects a distinct interest in obtaining each piece of desired testimony. To the contrary, however erroneous an evidentiary decision may be, it will violate due process only where it "fatally infected [the] trial and deprived [the defendant] of fundamental fairness." *Turner v. Armontrout*, 845 F.2d 165, 170 (8th Cir.), *cert. denied*, 488 U.S. 928 (1988); *see also Maes v. Thomas*, 46 F.3d 979, 987 (10th Cir.) (on *habeas* review, evidentiary rulings raise no due process question unless the trial, as a whole, was rendered fundamentally unfair), *cert. denied*, 115 S. Ct. 1972 (1995).

Such decisions demonstrate that, while the Due Process Clause may protect an interest in a fundamentally fair procedure for determining an overall cause of action, it does not transform every evidentiary quarrel into a constitutional claim. Indeed, it is clear that adopting petitioners' radical assertion of a protected "property interest" would involve this Court in endless micromanagement of state court litigation.

In the end, accepting petitioners' due process claim would expand *Wilks* beyond all recognizable bounds and effectively abandon any limits on the type of interests afforded due process protections. Behind petitioners' argument is the insupportable claim that they are "bound" by a judgment in violation of due process whenever a judgment has *any* collateral impact on them. Petitioners even make that claim explicit, asserting that "a judgment cannot *affect* a stranger to the original lawsuit without violating procedural due process." Petrs. Br. 15 (emphasis added; quotation omitted). That is plainly not the law, however, for the only party being "bound" to the injunction is Elwell, and holding him to his legal obligations does not violate anyone's due process rights.

A judgment in one case obviously can *affect* others in innumerable ways without raising due process concerns. If a court sentences a criminal defendant to a prison term, the convict will likely be unavailable as a witness. Yet no one would argue that a litigant seeking testimony would have a due process right to contest the conviction and sentence. So too, if one creditor obtains a judgment against a corporation with a limited pool of assets, that judgment might adversely affect all other creditors. Yet the other creditors would have no right to relitigate that distinct judgment. *See, e.g., Morris v. Jones*, 329 U.S. 545 (1947). Nevertheless, that is precisely the result that would flow from petitioners' expansive view of the "interests" to which due process protection attaches.

To buttress their proposed due process right, petitioners dredge up a single inapposite case -- *Ex parte Uppercu*, 239 U.S. 435 (1915). In *Uppercu*, the Court held only that a trial court had no authority to seal the record and depositions in a case and to bar access to them by later litigants where "*[n]either the parties to the original cause nor the deponents have any privilege.*" *Id.* at 440 (emphasis added). The only holding was thus that it was improper to bar access to the sealed material when there was no basis for the sealing order.

To the extent the Court suggested some "right" of access to the material, it plainly was referring only to the "general principle," *id.* at 439, now widely accepted, that litigants should be allowed discovery of relevant information. The Court expressly held, moreover, that such a "right" exists only "unless some exception is shown." *Id.* at 440. Among these exceptions are the traditional privileges against disclosure, which the Court specifically noted were *absent* in that case. The holding in *Uppercu* thus says nothing about enforcing the Michigan injunction, which was entered to protect the attorney-client and other privileges.

Moreover, *Uppercu* was not a due process holding at all. The case involved a petition for mandamus and came within the Court's supervisory power to control discovery in the federal courts. *See* 239 U.S. at 438-41. If *Uppercu* had rested on a due process holding, it would have led to the absurd result that every ruling on a discovery question limiting access to potential evidence would raise a constitutional issue. In fact, that is precisely the result urged by petitioners here -- every fight over obtaining documents, presenting testimony, and claiming a privilege would become of constitutional magnitude.[25]

In any event, to the extent petitioners would distort *Uppercu* to establish some all-encompassing right of access to evidence, the case cannot support that bold proposition. The district courts have broad powers to enter protective orders, including sealing orders, for any reason amounting to "good cause." Fed. R. Civ. P. 26(c); *see, e.g., In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987). And even where a litigant in a subsequent case seeks access to such restricted materials, the proper course is to seek modification

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[25] The effect of this approach for federal *habeas* cases would be extraordinary, for every point of dissatisfaction about how the case was tried in state court would have to be evaluated as a constitutional claim -- a result that would be as unmanageable as it would be undesirable.

from the court that issued the order, which generally has broad discretion in deciding whether to modify. *See, e.g., United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427-28 (10th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

Thus, nothing in *Wilks*, *Uppercu*, or this Court's due process decisions supports petitioners' sweeping claims.

B. Even If Petitioners Had a Protected Interest in Elwell's Testimony, Enforcing Full Faith and Credit Here Does Not Violate Due Process.

Even if petitioners could establish a "right" to Elwell's testimony protected by the Due Process Clause, their belatedly contrived constitutional claim rests on a misunderstanding of the law. They incorrectly assume that honoring the commands of full faith and credit will deprive them of *any* opportunity to be heard on their challenge to the Michigan injunction. In jumping to that conclusion, however, petitioners never pause to analyze precisely what full faith and credit requires in this case.

Affording the injunction full faith and credit means giving it the *same* effect it would have in the courts of Michigan. In Michigan, the effect of the injunction on third parties such as petitioners is clear: it requires them to contest the injunction *in the court that issued it*. Only that court, under Michigan law, has power to modify or vacate the injunction. It is evident, however, that simply requiring petitioners to abide by that orderly procedure and present their arguments to the Michigan court does not violate due process.

1. Full Faith and Credit Merely Requires Petitioners to Proceed in the Michigan Court.

By assuming that full faith and credit would bar them from challenging the Michigan injunction, petitioners misunderstand the nature of that command. In implementing the Full Faith and Credit Clause, Congress has directed that state judgments are to be given "the same full faith and credit" as they have "by law

or usage in the courts of [the] State . . . from which they are taken." 28 U.S.C. § 1738. The Court long ago settled that this unambiguous command makes the local laws of the rendering State the measure of full faith and credit and requires that a judgment be given "the same *credit, validity and effect*, in every other court of the United States, which it had in the state where it was pronounced." *Hampton*, 16 U.S. (3 Wheat.) at 235 (emphasis added).

The Court has recently reiterated that this command demands in the broadest terms that a judgment be given everywhere the "*same respect* that it would receive in the courts of the rendering state." *Matsushita*, 116 S. Ct. at 877 (emphasis added). As a result, other courts "may not employ their own rules . . . in determining the effect of state judgments, but must accept the rules chosen by the State from which the judgment is taken." *Id.* (quotation omitted).[26]

Here, Michigan law clearly establishes the effect that an injunction has on third parties such as petitioners. In Michigan, no trial court other than the one that entered the injunction has the authority to alter or modify it. *See* Mich. Ct. R. 2.613(B) (a "judgment or order" may be set aside or vacated "only by the judge who entered the judgment or order, unless that judge is absent or unable to act"). The Michigan rule, in fact, is

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[26] The cases cited by petitioners denying full faith and credit to judgments rendered without jurisdiction, *see* Petrs. Br. 13-14, fit comfortably within this framework, for a judgment "rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 291 (1980); *see also Underwriters*, 455 U.S. at 704 n.10 ("One State's refusal to enforce a judgment rendered in another State when the judgment is void for lack of jurisdiction merely gives to that judgment the same 'credit, validity, and effect' that it would receive in a court of the rendering State."). The difference here, of course, is that the Michigan injunction is *not* void *ab initio*; instead, it is a valid, binding order entered by a court with proper jurisdiction over the parties before it.

particularly salient in the circumstances here, since "[t]he policy behind the rule requiring litigants to appear before the judge who made the judgment or order is that *the original judge is best qualified to rule on the matter*." *Huber v. Frankenmuth Mut. Ins. Co.*, 408 N.W.2d 505, 508 (Mich. Ct. App. 1987) (emphasis added). Moreover, the rule serves the salutary goal of "preserv[ing] the dignity and stability of judicial action" by "preventing 'judge shopping.'" *Id.*; *see also Palmer v. Kleiner*, 210 N.W. 332, 333 (Mich. 1915) (explaining that the statutory antecedents of this rule also served "to guard against a confusion of conflicting orders or decrees"). Under Michigan law, therefore, if a third party in petitioners' position wished to have Elwell testify in another Michigan court, that court would not be authorized to compel his testimony. Instead, the second court would require the requesting party to return to the court that entered the injunction to press his or her claim there. *See, e.g., Berar Enters., Inc. v. Harmon*, 300 N.W.2d 519, 523-25 (Mich. Ct. App. 1980) (holding that a second judge lacked jurisdiction to modify a consent decree where the first judge was not "absent or unable to act").

Indeed, on two separate occasions, other Michigan trial courts have reached this exact result in connection with the injunction entered against Elwell. The plaintiffs in two different actions against General Motors have asked *other* Michigan courts, in effect, to modify the permanent injunction by ordering Elwell to testify. In each case, General Motors argued that, under Rule 2.613(B), only the judge that entered the injunction has proper authority to alter the obligations imposed on Elwell. In each case, the other Michigan court declined to upset the injunction, concluding instead that the plaintiffs' proper avenue for relief lay in the issuing court. *See Brisboy* Order and Transcript (Appendix D); *McLain* Order (Appendix E) (noting that "Plaintiff clearly asks this Court to ignore the plain meaning of the August 1992 Permanent Injunction"). Thus, decisions

addressing *this very injunction* have settled its minimal and reasonable effect on third parties in the Michigan courts.

Under the Full Faith and Credit Statute, according the "same full faith and credit" to the Michigan injunction in this case as it has "by law or usage" in the Michigan courts, 28 U.S.C. § 1738, simply means requiring petitioners to go back to the Michigan court that issued the injunction to raise their claims for having Elwell testify. *See Johnson*, 340 U.S. at 587 (full faith and credit bars a collateral attack on an out-of-state decree "where the party attacking would not be permitted to make a collateral attack in the courts of the granting state").[27]

2. Requiring Petitioners to Press Their Challenge in Michigan Does Not Violate Due Process.

Once the consequences of affording full faith and credit to the Michigan injunction are correctly understood, it is

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[27] Contrary to the claims petitioners advanced below, moreover, the mere fact that the issuing court in Michigan has the power to modify the injunction does not give the District Court the same power. The District Court would plainly not be affording the injunction the "same respect that it would receive in the courts of the rendering state," *Matsushita*, 116 S. Ct. at 877, if it were to arrogate to itself a power that the other Michigan courts recognize as vested exclusively in the issuing court.

This Court's decisions on the "peculiar status" of child custody decrees, *Thompson v. Thompson*, 484 U.S. 174, 180 (1988), are not to the contrary. The leading decision of *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947), established only that where a custody decree can be revisited by any court in its home State, the courts of a second State should be equally able to modify the decree. *Id.* at 613 (noting "the custody decrees of Florida courts are ordinarily not *res judicata* either in Florida or elsewhere"). The Court thus explicitly rested on the "narrow ground" that "a judgment has no constitutional claim to a *more conclusive* or final effect in the State of the forum than it has in the State where rendered." *Id.* at 614-15 (emphasis added). Decisions like *Halvey* in no way suggest that where, as here, a State *does* give conclusive effect to an injunction entered by one of its courts, and denies other courts within the State the power to modify its terms, a judgment issued on that basis can be ignored elsewhere.

abundantly clear that petitioners do not have even a colorable due process argument. The cases on which petitioners rely holding that a judgment cannot "bind" persons who were not parties, *see, e.g.*, *Wilks*, 490 U.S. at 762; *Richards v. Jefferson County*, 116 S. Ct. 1761, 1765-66 (1996), are wholly irrelevant. Channeling petitioners' challenges to a particular forum does not "bind" them to a judgment or foreclose their opportunity to be heard. It merely requires them to raise their arguments under an orderly process established by Michigan law.

The Michigan rule, far from concluding any claimed "rights," acknowledges the unalterable fact that once a court with jurisdiction entered an injunction prohibiting Elwell from testifying, that obligation *on Elwell* changed the legal landscape in which petitioners were operating. After the injunction issued, the only way petitioners could have Elwell testify (short of violating the injunction) was to have the injunction altered. The Michigan rule simply requires petitioners to assert their claims in the forum best situated to grant or deny, in an orderly manner, the relief they (and others) may seek. It thus works no violation of due process, for it does not deny petitioners their opportunity to be heard; it just requires them to be heard in the Michigan court.[28]

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[28] To the extent petitioners might now attempt to claim that the Michigan courts will not afford them the process they believe is due, the short answer is that such a claim is impermissible. Without even attempting to pursue their remedy in Michigan, petitioners cannot assert a hypothetical lack of process in an effort to have another court ignore the command of full faith and credit by modifying the Michigan injunction. As this Court has emphasized, even minimal respect for state judicial processes "precludes any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). Thus, as a threshold matter, full faith and credit requires petitioners to return to the issuing court in Michigan. If they then believe the process in that court is lacking, their proper remedy lies in direct appeal, with ultimate review available from this Court.

Nothing in the Court's decisions concerning the impact of consent decrees on third parties indicates that giving the injunction this forum-selection effect could possibly raise any due process concerns. To the contrary, the Court has noted approvingly that a consent decree entered between two parties will have *precisely* the effect of "channeling litigation" by any third parties back to the court that entered the decree. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 523 n.13 (1986). Indeed, the Court explained that this approach promotes the same objective that is served by the Michigan rule -- avoiding "the risk of inconsistent or conflicting obligations." *Id.*; *cf. Palmer*, 210 N.W. at 333 (the "manifest purpose" of the Michigan rule is "to guard against a confusion of conflicting orders or decrees"). Indeed, in *Uppercu*, the case petitioners themselves showcase, the Court explained that where one court has sealed materials in a case and others seek access to them, "the orderly course is to obtain a remission of the command *from the source from which it came*." *Uppercu*, 239 U.S. at 440 (emphasis added). Far from trampling anyone's legitimate due process rights, such a channeling rule promotes the orderly resolution of disputes by ensuring that whenever third parties feel aggrieved by an outstanding court order, the competing concerns of *all* interested persons will be brought before the *same* court for adjustment.

In this case, moreover, it is also clear that there is no due process violation because of the marginal weight of the due process "interest" that petitioners assert. As this Court has repeatedly explained, due process does not have a "fixed content" but rather is "flexible and calls for such procedural protections as the particular situation demands." *Gilbert v. Homar*, 117 S. Ct. 1807, 1812 (1997). As described above, *see supra* Section IV.A, petitioners' purported "right" to procure Elwell's testimony does not warrant full-blown constitutional protection. Even if their claim did merit *some* due process protection, however, it would be unreasonable to contend that

requiring petitioners to go to a Michigan court to press their claims would somehow deny them whatever process is due. After all, *whenever* a potential witness is located outside the limits of a court's subpoena power, litigants hoping to secure that witness's testimony must proceed to the local courts where the witness can be found. *See, e.g.*, Fed. R. Civ. P. 45.

In this case, even without the Michigan injunction, if Elwell had not assisted petitioners by appearing in Missouri, they would have had to travel to New Mexico to seek a subpoena compelling him to appear for a deposition or trial, with no certain prospect of success. Since the standard process for enforcing the supposed "right" that petitioners assert often entails the burden of traveling to the local courts where a witness can be found, simply changing petitioners' destination by requiring them to press their claims in a Michigan court cannot possibly violate due process.

Indeed, petitioners' argument on this point has nothing to do with full faith and credit at all: if the Court were to hold that it violates due process to require petitioners to return to the court that issued the injunction, that would make the applicable Michigan rule of procedure equally unconstitutional *even as it applies within the State of Michigan*. It could hardly be argued that there is a difference of constitutional magnitude between (i) requiring third parties in Michigan who want Elwell's testimony to return to the issuing court and (ii) requiring petitioners here to return to that court. In each case, the injunction is given the same effect against non-parties: it determines the forum in which they can raise claims for access to Elwell's testimony. Petitioners' ambitious arguments thus would render Michigan Rule 2.613(B), as applied by the Michigan courts, unconstitutional. Indeed, they would establish a new rule of constitutional law that would prohibit *every* State from enforcing a salutary rule of procedure that merely channels

later litigation concerning an injunction -- whoever the parties may be -- back to the court that issued the original decree.[29]

C. Those in Active Concert to Violate an Injunction Can Be Bound Without Violating Due Process.

Finally, even if petitioners could assert a legitimate due process right (which they cannot), and even if the full faith and credit command denied them any opportunity to challenge the Michigan injunction (which it does not), and even if they were being held "bound" by the Michigan injunction (which they are not), there would still be no due process violation in this case because it is virtually certain that petitioners or their agents have acted in concert with Elwell to assist him in defying the Michigan injunction.

Under the governing rules, the Michigan injunction binds not only the parties to the action but also "*those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise*." Mich. Ct. R. 3.310(C)(4) (emphasis added). *Cf.* Fed. R. Civ. P. 65(d) (same). It is well settled that it does not violate due process for such persons to be held in contempt for aiding and abetting an enjoined party in violating the binding terms of an injunction, even though they were not parties to the underlying litigation. *See, e.g., Reich v. United States*, 239 F.2d 134, 137 (1st Cir. 1956) ("It has been settled law for a long time that one who knowingly aids, abets, assists, or acts in active concert with, a

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[29] In *Wilks* itself, the firefighters who were held not bound by the prior decree no doubt recognized that only the District Court that had entered the decree would be able to grant the relief they sought -- an injunction changing the terms of the decree -- and thus they brought their action before the same court. *See* 490 U.S. at 759-61. At bottom, petitioners are arguing that if the white firefighters in *Wilks* had brought their Title VII action in a different court, and that court had transferred the case back to the issuing court to ensure a more efficient and informed disposition, *the transfer would have violated the Due Process Clause*. Merely to frame the argument in this manner is to refute it.

person who has been enjoined in violating an injunction subjects himself to civil as well as criminal proceedings for contempt even though he was not named or served with process in the suit in which the injunction was issued"), *cert. denied*, 352 U.S. 1004 (1957).

In this case, following a pattern repeated across the country (but not in Michigan), Elwell appeared in Missouri and was served with a subpoena from the District Court "compelling" his deposition the next day. *See supra* pages 6-8. It is virtually certain that this occurred by prearrangement with petitioners' counsel, even though the injunction prohibits Elwell from "consulting with attorneys or their agents in any litigation [against General Motors]." J.A. 30. It is also virtually certain that petitioners' trial counsel were on actual notice of the Michigan injunction, especially in view of the extensive litigation that has surrounded it. Thus, even though petitioners and their agents were not parties in Michigan, in the circumstances here they almost certainly could be held directly bound to comply with the injunction under pain of contempt. *See Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13-14 (1945) (under Rule 65(d), "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding").

The only reason the record is incomplete on these points is that petitioners did not raise their due process claim in a timely manner. For the reasons stated above, there should be no need for the Court to reach this far into petitioners' due process claims to dispose of this case. Even if the arguments above did not conclude the case in General Motors' favor, however, there can be no basis for *reversing* the judgment below under petitioners' brand-new theory, where the facts necessary to support their claims were never properly developed and examined below. General Motors respectfully suggests that rather than endorsing a constitutional theory that was hastily patched together on an inadequate record, the Court should

decline to address petitioners' new-found due process claim. *See, e.g., Matsushita*, 116 S. Ct. at 880 n.5 ("we generally do not address arguments that were not the basis for the decision below").

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

THOMAS A. GOTTSCHALK
JAMES A. DURKIN
GENERAL MOTORS
CORPORATION
3031 West Grand Boulevard
Detroit, Michigan 48232
(313) 556-5000

KENNETH W. STARR
Counsel of Record
PAUL T. CAPPUCCIO
RICHARD A. CORDRAY
JAY P. LEFKOWITZ
PATRICK F. PHILBIN
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Attorneys for Respondent.

July 21, 1997

APPENDICES

APPENDIX A

United States District Court

FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

KENNETH BAKER and
STEVEN BAKER, by Next Friend,
MELISSA THOMAS
AIMEE SHOEMAKER and JESSICA
SHOEMAKER, by Next Friend,
AMANDA EMBREE
V.
GENERAL MOTORS
CORPORATION

SUBPOENA IN A CIVIL CASE

CASE NUMBER 91-0991-CV-W-8
CASE NUMBER 91-0990-CV-W-8

TO: Ronald Elwell
9713 Admiral Dewy N.E.
Albuquerque, NM 87111

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date and time specified below to testify in the above case

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case

PLACE OF TESTIMONY	DATE AND TIME
Judge John Maughmer's Courtroom US District Court - 211 U.S. Courthouse 811 Grand Avenue Kansas City, Missouri 64106	Wednesday June 23, 1993 9:00 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE OF TESTIMONY	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following at the date and time specified below.

PLACE OF TESTIMONY	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure. 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE June 22, 1993

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
BRADLEY, LANGDON, BRADLEY, EMISON & ROSS
P.O. Box 130
Lexington, Missouri 64067 Attorneys for Plaintiffs (816) 259-2288

PROOF OF SERVICE		
SERVED	DATE 6/22/93 8:01 a.m.	PLACE Downtown Marriott Allio Plaza Hotel Kansas City, MO
SERVED ON (PRINT NAME) Ronald Elwell		MANNER OF SERVICE Personal by hand delivery
SERVED BY (PRINT NAME) Carter J. Ross		TITLE Attorney for Plaintiffs
DECLARATION OF SERVER		

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on 6/23/93
DATE

/s/ Carter J. Ross
SIGNATURE OF SERVER

8 South 10th Street, P.O. Box 130
ADDRESS OF SERVER

Lexington, MO 64067

APPENDIX B

SUPERIOR COURT OF CALIFORNIA
COUNTY OF STANISLAUS

MICHAEL D. STEPHENS and ROBERT A. STEPHENS, Plaintiffs vs. GENERAL MOTORS CORPORATION, Defendant.	))))))	No. 36740

Before the HONORABLE HURL W. JOHNSON, Judge,
Dept. C, Wednesday, May 21, 1997 9:28 A.M.

* * *

[Trial Transcript, pp. 3502-3503]

Q: Mr. Elwell. I think you were asked by -- or counsel mentioned at the beginning of his examination of you yesterday that he at least expected that he would pay your travel expenses to be here and to compensate you for -- I think you identified it as your loss of business opportunity.

At what rate do you charge for the loss of your business opportunity?

A: One eighth of what you charge.

MR. GREENFIELD: Your Honor, may I ask that be stricken?

THE COURT: It is stricken. Disregard it.

Do you have an hourly charge that's charged, sir?

THE WITNESS: I charge $300 hourly.

APPENDIX C

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

RONALD ELWELL,

Plaintiff,

v.

GENERAL MOTORS CORPORATION,
a Delaware corporation,
and WILLIAM CICHOWSKI,

Defendants.

91-115946 NZ 6/19/91
JDG: Richard P. Hathaway
ELWELL RONALD
VS.
GENERAL MOTORS CORP.

Courtney E. Morgan, Jr. (P29137)
Attorney for Plaintiff
1490 First National Building
Detroit, Michigan 48226

Charles C. DeWitt, Jr. (P26636)
Attorney for Defendants
400 Renaissance Center
Detroit, Michigan 48243

ORDER DENYING
PLAINTIFF'S MOTION REQUESTING
CLARIFICATION OF PERMANENT INJUNCTION

At a session of said Court held in the
City County Building, City of Detroit,
County of Wayne, State of Michigan,
on Nov. 2, 1992.

PRESENT: Honorable Richard P. Hathaway
Wayne Circuit Court Judge

Upon reading and filing of Plaintiff's Motion Requesting Clarification of Permanent Injunction, Defendants' Response, and for all the reasons stated on the sealed record in chambers on Thursday, October 22, 1992:

IT IS HEREBY ORDERED that Plaintiff's Motion Requesting Clarification of Permanent Injunction BE, and hereby is, DENIED.

RICHARD P. HATHAWAY
Hon. Richard P. Hathaway
Wayne Circuit Court Judge

APPENDIX D

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

CAROL ANNE BRISBOY,

Plaintiff,

v. Case No. 94-77688-NP

GENERAL MOTORS CORPORATION, a corporation, Hon. Thomas L. Brown

Defendant.

Gregory W. Stine (P25626)
Arnold D. Portner (P23954)
Attorneys for Plaintiff
(810) 540-7060

Mark R. Granzotto (P31492)
Attorney for Plaintiff
(313) 964-4720

James P. Feeney (P13335)
Peter M. Kellett (P34345)
Attorneys for Defendant
(810) 258-1580

ORDER DENYING PLAINTIFF'S MOTION TO PRESENT TESTIMONY OF RONALD E. ELWELL

At a session of said Court held in the Ingham County Courthouse, County of Ingham, State of Michigan, on 11/9/95

PRESENT: HON. THOMAS L. BROWN
CIRCUIT COURT JUDGE

Upon reading and filing of Plaintiff's Motion to Present Testimony of Ronald E. Elwell, Defendant's Response, and for all the reasons stated on the record on Wednesday, November 8, 1995:

IT IS HEREBY ORDERED that Plaintiff's Motion To Present Testimony of Ronald E. Elwell be, and hereby is, DENIED.

THOMAS L. BROWN
CIRCUIT COURT JUDGE

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

CAROL ANNE BRISBOY,

Plaintiff,

v. File No. 94-77688-NP

GENERAL MOTORS CORPORATION,
a corporation,

Defendant.

MOTIONS

BEFORE THE HONORABLE THOMAS L. BROWN,
CIRCUIT JUDGE, LANSING, MICHIGAN
-- WEDNESDAY, NOVEMBER 8, 1995

APPEARANCES:

MARK R. GRANZOTTO, J.D.

On behalf of the Plaintiff

JAMES P. FEENEY, J.D.

On behalf of the Defendant

* * *

THE COURT: You are saying that this Court has power to set aside the injunction entered by another Judge?

MR. GRANZOTTO: This Court does, in fact, have that power under Michigan law. This Court, Your Honor, has before it, a case --

THE COURT: I don't have any power to set aside --

MR. GRANZOTTO: We are not.

THE COURT: -- an injunction by another circuit judge, Judge Hathaway in Wayne County Circuit Court?

MR. GRANZOTTO: Now, well, Your Honor, the Defendants have in fact cited to this Court MCR 2.613(B), which they have argued precisely that point which you have no such power. The Defendant's motion is incorrect.

* * *

THE COURT: Is he going to be testifying in any Michigan Courts?

MR. GRANZOTTO: To my knowledge, no.

MR. FEENEY: No, this is the first time the issue has arisen. And an attempt has been made to collaterally attack the courts in Michigan.

MR. GRANZOTTO: Mr. Feeney's comments are incorrect. This is not a collateral attack on an order issued. This Court has the ability to order that Mr. Elwell appear in this Court and give testimony.

Your Honor, what I have presented to this Court is quite simply this: General Motors has bought the silence of a witness who has material evidence in this particular case. They have done so, Your Honor, precisely because they have signed or helped prepare an injunction which has two elements to the -- the first is clearly that Mr. Elwell cannot testify as to privileged matters.

THE COURT: If that's his position, why don't you go down before Judge Hathaway, get it set aside?

MR. GRANZOTTO: Because, Your Honor, you have this case.

THE COURT: But Judge Hathaway has got the injunction.

* * *

MR. GRANZOTTO: I have cited to the Court a Michigan Supreme Court case which indicates that nobody can enter into an arrangement with another party to preclude the presentation of relevant and material evidence. That is a Michigan Supreme Court case which the Defendants, in their brief, choose not to respond to. And there is good why reason [*sic*] they can't respond to it, because they don't have a response to this.

I have also cited to the court the Kuberski opinion from the Michigan Supreme Court which indicates that this Court should be considering the interest of third parties who had no involvement in that earlier order entered by Judge Hathaway.

The third party who was involved in this case is Mrs. Brisboy, the Plaintiff herein. Mrs. Brisboy was not aware, at the time she had her car accident, that she had suffered her

injuries, that General Motors and Mr. Elwell had entered into this settlement under which Mr. Elwell was precluded in giving testimony for future cases involving General Motors.

This Court can consider Mrs. Brisboy's interest in this case. This Court should also consider the fact that this Court is about to conduct a trial in this case in which there is relevant evidence out there which General Motors can preclude from being presented in this Court, precisely, because they have paid money to a witness not to present any evidence testimony in any further cases presented against General Motors. That is what is going on in this case. This Court should not allow that to happen. And under 2.613(B), I am not required to go back before Judge Hathaway to secure such a order.

Does the Court have any further questions?

THE COURT: No, any response?

MR. FEENEY: Yes, Your Honor. Your Honor, we respectfully disagree with Mr. Granzotto in his attempt to convince this Court that he is doing anything other than

seeking to have this Court modify a permanent injunction which was issued by Judge Hathaway in 1992.

* * *

Judge Hathaway has specifically the injunction [*sic*], specifically retaining jurisdiction over Mr. Elwell and his attorney and General Motors with respect to the injunction. . . . I strongly disagree with Mr. Granzotto under the law of Michigan. The way to attack an injunctive order, direct appeal, go back to the judge that issued it.

This notion that he can serve a witness list in this case, and ask you to alter and modify the expressed terms in the injunction, which he admits prohibit Mr. Elwell from testifying, is simply not probable, Your Honor.

* * *

THE COURT: [. . . .] I am going to deny the motion. I think your best bet, go back to see Judge Hathaway to get the restriction lifted.

MR. GRANZOTTO: I am not willing to do it.

THE COURT: Are you going to prepare the order?

MR. FEENEY: Yes, I will. Your Honor.

(Whereupon, proceedings concluded.)

APPENDIX E

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

SHARYN A. MCLAIN, Personal Representative of the Estate of KRISTIN DAWN McLAIN-SUTHERLAND, deceased,
Plaintiff,

vs.

GENERAL MOTORS CORPORATION, FRUEHAUF TRAILER CORPORATION, FREUHAUF TRAILER COMPANY OF CANADA, LTD., FRUEHAUF TRAILER CO., FRUEHAUF CANADA, INC., FRUEHAUF CORPORATION, FRH ACQUISITION CORPORATION, THE TRAILMOBILE GROUP OF COMPANIES, LTD., 160052 CANADA, INC., THE BRADFORD GROUP OF COMPANIES, LTD., GEMALA INDUSTRIES, LTD., TRAILMOBILE OF CANADA, NORAN LEASING, INC., AMERICAN MARINE SHORE CONTROL, INC., RICHARD MINI d/b/a AMERICAN MARINE SHORE CONTROL, INC., MICHAEL PAUL JONES and LEONARD MARTIN, jointly and severally,
Defendants.

Case No. 93-465507-NP
HON. RUDY J. NICOLS

ORDER DENYING PLAINTIFF'S MOTION TO ALLOW DEPOSITION OF RONALD ELWELL

At a session of said Court, held in the City of Pontiac, County of Oakland, State of Michigan on 3/11/96.

Plaintiff's Motion To Allow Deposition of Ronald Elwell was argued before this Court Wednesday March 6, 1996.

Plaintiff Sharyn McLain is the personal representative for the deceased Kristin McLain-Sutherland who died following an accident in her S-10 Blazer on March 20, 1992. Basically, Sutherland's S-10 Blazer struck a trailer blocking the westbound lanes of M-59 and then was hit by another truck moments later.

In Plaintiff's product liability component of the case, Plaintiff maintains that a rubber sleeve holding fuel hoses spilled and ignited a fire that caused Ms. McLain-Sutherland's death. Defendant G.M. maintains the Blazer's hoses were not the cause of Ms. McLain-Sutherland's death but rather that the second collision led to a combustion and her death.

Plaintiff argues it has a witness -- a Mr. Ronald Elwell -- who was a former GM employee/engineer who could testify as to the soundness of the rubber sleeve holding the fuel hoses at issue and that he (Elwell) advocated a better alternative which GM failed to adopt for economic reasons. Defendant GM claims otherwise and that Elwell is prohibited from testifying due to an August 1992 injunction precipitated by a consent settlement reached between GM and Elwell in a wrongful discharge action which prohibits Elwell from testifying in suits against GM without GM's consent.

MRE 102 and 6112(a) provide that a Trial Court's quest must -- and should be -- the ascertainment of the truth. A Trial Court, as such, is a vehicle for getting the information -- proper information -- before the fact-finder. In this case, however, there is an Injunctive Order this Court is being asked to observe (or ignore) that appears to preclude information from getting before the fact-finder which could have an impact upon the trial's outcome.

Despite the potential gravity of Elwell's testimony, however, this Court declines to "permit the deposition of Ronald Elwell to go forward," as requested by Plaintiff, for the following reasons:

1) It appears that Plaintiff has failed to Notice for Deposition the testimony of Mr. Elwell. Even if Plaintiff has so noticed the deposition, Plaintiff is seeking an advisory ruling on an issue not properly before this Court. As noted in Reed v. Soltys, 106 Mich App 341 (1981), the 1992 Wayne County order must be obeyed until overturned on direct appeal, @ p. 350.

2) Plaintiff argued on March 6 that Plaintiff is not seeking privileged information and that others besides Elwell know the same information. As such, there appears to be less drastic alternatives than that of violating Judge Hathaways order, i.e., Plaintiff can resort to other engineers who could testify on her behalf.

3) Plaintiff has not addressed why this Court should grant her request when it is beyond the discovery cut-off date that applies to this case.

4) While Plaintiff argued otherwise, Plaintiff clearly asks this Court to ignore the plain meaning of the August 1992 Permanent Injunction. Plaintiff does this despite the clear intent of that injunction and having been twice denied relief by the Judge who issued the order.

For these and other reasons stated by Defendant, Plaintiffs Motion is DENIED.

RUDY J. NICHOLS
CIRCUIT JUDGE

3/11/96
Date

Rudy J. Nichols - Circuit Court Judge